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No. 07-1584

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In The

Supreme Court of the United States

DANNY RAY LEE,

Petitioner,

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

(1) Whether this court should grant this petition, (as it recently did in a similar case, *Jimenez v. Quarterman,* No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352) to review the application of *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004) in a Louisiana state law context where the Fifth Circuit denied a Certificate of Appealability to review a federal district court decision holding that when a Louisiana petitioner obtains a state out-of-time direct appeal through the use of the "mechanism" of state post-conviction relief that the granting of the appeal does not restart the one-year statute of limitations clock found in 28 U.S.C. Section 2244(d)(1)(A), but merely suspends the running of the one-year clock pending a decision on the appeal?

(2) Whether the Fifth Circuit erred in denying a Certificate of Appealability to review a decision of the federal district court dismissing Lee's petition as time barred by the AEDPA one-year statute of limitations (28 U.S.C. Section 2244(d)(1)(A) on the grounds that, in accordance with *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004), the granting of an out-of-time appeal does not restart the running of the one-year clock, but merely suspends the running pending the appeal?

(3) Whether there is a significant conflict among the federal circuit courts of appeal on the issue whether an out of time direct appeal restarts the AEDPA one-year clock or merely suspends it pending the appeal?

QUESTIONS PRESENTED – Continued

(4) Assuming that a significant conflict exists on this question is the Fifth Circuit case of *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004) the correct application of federal law on this issue so as to assure federal uniformity in habeas proceedings?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTRODUCTION AND SUMMARY OF ARGUMENT IN OPPOSITION	1
ARGUMENT	6
I. APPLICATION OF 28 U.S.C. SECTION 2244(d)(1)(A) ONE-YEAR STATUTE OF LIMITATIONS IN FEDERAL HABEAS CASES TO THIS CASE	6
A. Outline and Analysis of Important Dates and Events Involved in Lee's Direct Appeal and On State and Federal Post-Conviction Relief	6
1. Direct Appeal	7
2. Post-Conviction Relief and Out of Time Direct Appeal in State Court	8
3. Post-Conviction Relief in Federal Court	9
B. Louisiana's Out-of-Time Appeal Jurisprudence and the application of *Salinas*	10
1. Constitutional Right to Direct Appeal	10

TABLE OF CONTENTS – Continued

Page

2. *State v. Counterman* and Out-of-Time Appeal in Louisiana 11

3. *Salinas* 13

4. Application of *Salinas* in Louisiana 14

C. Comparative Analysis of Out-of-Time Direct Appeal Jurisprudence in Federal Appellate Courts 15

1. *Frasch*, (4th), *Orange*, (10th), and *Summers*, (9th) 15

2. *Salinas*, (5th), *Lopez*, (6th), *Teas*, (7th), and *O'Neal*, (8th) 16

D. *Salinas* Is the Correct Resolution of Any Conflict 17

E. Should Writs be Granted in Light of the Writ Grant in *Jimenez v. Quarterman*? 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

STATUTES

28 U.S.C. Section 2244(d)(1)(A) 3, 4, 6, 9

JURISPRUDENCE

Butler v. Cain, 2008 WL 2514644, 6/25/08 14

Cary v. Saffold, 536 U.S. 214 (2002).....17

Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2110, 150 L.Ed.2d 251 (2001) 18

Evans v. Chavis, 546 U.S. 189 (2006).....17

Frasch v. Peguese, 414 F.3d 518 (4th Cir. 2005).....15, 18

Gilliam v. Jones, 2007 WL 1347807 15

Jennings v. Leger, 2008 WL 2899571 15

Jimenez v. Quarterman, No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352 .....4, 19, 20

Lee v. Cain, 2007 WL 1875837 3

Lopez v. Wilson, 426 F.3d 339 (6th Cir. 2005).....15, 16

McGee v. Cain, 104 Fed. Appx. 989 (5th Cir. 2004).....15

McKane v. Durston, 153 U.S. 684 (1894).....10

O'Neal v. Kenny, 2007 WL 2492466.....15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

Orange v. Calbone, 318 F.3d 1167 (10th Cir. 2003) 15, 16

Robinson v. Cain, 2008 WL 821955 15

Salinas v. Dretke, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004) ..... *passim*

Soileau v. Cain, 2005 WL 1629945 15

Sparks v. Hubert, 2008 WL 1746724 15

State v. Counterman, 475 So.2d 336 (La. 1985) 2, 8, 11, 13

Summers v. Schriro, 481 F.3d 710 (9th Cir. 2007) 15, 16

Tapp v. Cain, 2007 WL 2323356 15

Teas v. Endicott, 494 F.3d 580 (7th Cir. 2007) 15, 16

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the strangulation and throat slitting murder of a young Oklahoma woman traveling through Louisiana on a trip to visit each state in America "wahooing" or stealing gas (pumping gas and driving off without paying for it). Danny Lee and Davey Coslow (who are half brothers) and who were traveling companions of the victim murdered her on September 1, 1999, because they believed she informed the Oklahoma police about their drug activities. The murder was witnessed by the wife of Coslow.

At a preliminary hearing, Lee was represented by Gray Legros of the Indigent Defender's Office (IDO) and Coslow was represented by Craig Colwart, also of the IDO. When the state targeted Lee as the primary defendant in the case, Colwart and LeGros switched clients. LeGros negotiated a plea agreement with the state for Coslow in return for his testimony against Lee at the trial. At trial, both Davey Coslow and his wife testified implicating Lee as the main protagonist in the murder. Colwart filed a timely motion for appeal which was granted by the trial court and the record was lodged with the appellate court.

On appeal Colwart did not assign errors or file a brief. The Louisiana First Circuit Court of Appeals reviewed the record for "patent error" and affirmed Lee's conviction on August 19, 1996. Colwart did not seek writs with the Louisiana Supreme Court within

the 30 day period provide by the Rules of the Louisiana Supreme Court.

On May 7, 1997 Lee filed his first pro se application for post-conviction relief. On September 9, 1997 the trial court denied this first application. On October 29, 1997 Lee filed a second pro se application for post-conviction relief. James Boren, Lee's present attorney, filed a motion to enroll and on a motion to convert Lee's application for post-conviction relief to an out-of-time appeal in accordance with the Louisiana Supreme Court case of *State v. Counterman*, 475 So.2d 336 (La. 1985). On September 24, 1999 the trial court granted Lee's motion for an out-of-time appeal. On February 16, 2001 the First Circuit affirmed Lee's conviction but ordered an evidentiary hearing on the conflict issue. The trial court held the hearing and on June 24, 2003 and granted Lee a new trial finding that Colwart's representation was ineffective due to his inability to adequately cross examine his former client, Coslow, at Lee's trial. The state applied for writs to the First Circuit, which reversed the trial court and affirmed Lee's conviction. Lee applied for writs to the Louisiana Supreme Court which on November 24, 2004 denied writs. Lee did not file a writ with the United States Supreme Court to review the denial of writs by the Louisiana Supreme Court. Almost a year later, on November 22, 2005 Lee filed his third application for post-conviction relief. This third application was denied by the trial court. Lee filed for writs of review with the First Circuit which denied writs. Lee filed for writs with the Louisiana Supreme Court, which denied writs.

Lee also had filed a habeas petition in the Western Federal District Court, State of Louisiana on February 23, 2007 and requested that it be stayed pending the outcome of his writ in the Louisiana Supreme Court. Once the Louisiana Supreme Court denied writs, Lee filed a motion to proceed forward with his federal habeas which was granted on May 18, 2007. The federal district court denied Lee federal habeas relief on June 28, 2007 on the grounds that the one-year statute of limitation period found in 28 U.S.C. Section 2244(d)(1)(A) did not "re-start" and run anew with the granting of the out-of-time appeal citing the Fifth Circuit case of *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004). Both the federal district court and the Fifth Circuit denied a certificate of appealability. It is this writ which is before this court, and this is respondent's opposition to the writ.

The one-year clock clearly had run by the time Lee filed his federal habeas petition. See *Lee v. Cain*, 2007 WL 1875837. The only way that Lee's petition would be timely is if the granting of the out-of-time appeal by the state district court somehow restarted a new "direct review" process as that term is used by the AEDPA in 28 U.S.C. Section 2244(d)(1)(A). Hence, the critical and narrow question present in this case is whether the one-year clock started to run anew due to the granting of an out-of-time appeal by the state district court.

The petitioner contends that the granting of the out-of-time appeal in this case by the state district

court on September 24, 1999 restarted the one-year statute of limitation for federal habeas petitions found in 28 U.S.C. Section 2244(d)(1)(A) and that the federal district court erred in finding that the limitation period did not restart and run anew. Lee argues that the use of a "functional analysis" shows that the granting of a new direct appeal should start the one-year clock anew. Finally, Lee contends that a conflict exists among the federal appellate courts concerning the correct method of analysis (functional vs. definitional) to use in deciding whether the one-year clock starts anew or is only suspended during an out-of-time appeal.

Initially, it should be noted that the question of whether there is a sufficient conflict among the circuits to justify the granting of writs in this case may be moot in light of the recent granting of writs in the similar case of *Jimenez v. Quarterman,* No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352. As a result, this court may decide to simply wait upon the decision in that case and then either dismiss the petition or remand Lee's petition to the district court for reconsideration in light of the decision in *Jimenez.* On the other hand, this court may want to grant writs in *Lee* and consider the application of *Salinas* in the context of Louisiana's out-of-time appeal procedure.

In any event, the respondent contends that any conflict that exits is, in part, the interpretation of different state statutes and jurisprudence by the federal courts. An analysis of the statutes of the

various states shows that the mechanism for granting a new appeal varies from state to state. This difference shows up as the perceived conflict among the circuits. Further, the respondent contends that, if a serious conflict exists, the federal district court and the Fifth Circuit correctly applied federal law (*Salinas*) to Louisiana's out-of-time appeal procedure in denying a certificate of appealability. This approach finds strong support in the clear intent of Congress in enacting the AEDPA namely, that the time filing federal habeas should be limited. Neither functional of definitional analysis provide an adequate standard for the court to use to determine what is "direct review" for the purpose of federal uniformity. The respondent submits that the standard found in *Salinas* best promotes the intent of Congress in enacting the AEDPA and of finality. Salinas concentrates on the "manner" or "mechanism" in which the review is obtained and not on the function of the review (direct review of all issue or limited review) or on the terms used to define it (direct or collateral). As a result, once the "normal direct review" takes place, the federal AEDPA clock starts to run. While it can be tolled, it cannot be restarted.

ARGUMENT

I. APPLICATION OF 28 U.S.C. Section 2244(d)(1)(A) TO THIS CASE.

A. Outline and Analysis of Important Dates and Events Involved in Lee's Direct Appeal and State and Federal Post-Conviction Relief.

On September 1, 1994 the victim, Sheila Tibblas an Oklahoma resident, and traveling companion of Lee, was murdered by Lee and Coslow in a sugar cane field in St. Mary Parish, Louisiana. She came to be in Louisiana because Danny Lee and two companions, (Davey Coslow and Sherry Coslow) who were husband and wife, left Oklahoma in a vehicle intending to visit all of the states in America stealing (wahooing) gas. Danny Lee and Davey Coslow are half brothers. According to both Davey Coslow and Sherry Coslow, Lee choked the victim and then cut her throat with a knife. Ultimately, Sherry Coslow told the police in Oklahoma about the murder in Louisiana. Davey Coslow also cooperated with the authorities, implicated Lee in the murder and took the police to the location of the body. The motive for the murder was that Lee and Coslow believed that the victim had spoken or would inform on their drug activities to the police in Oklahoma.

Both Davy Coslow and Lee were arrested for the murder. At a preliminary hearing held on November 9, 1994 Lee was represented by Mr. Gray LeGros of the Indigent Defender Office and Coslow was

represented by Mr. Craig Colwart also of the Indigent Defender Office. On Nov. 28, 1994 the defendant, Danny Lee, was charged by way of a grand jury indictment with second degree murder of Sheila Tibblas. On April 3, 1995 he was arraigned and entered a plea of not guilty. The case went to trial before a jury on April 3, 1995. Coslow testified in the trial and implicated Lee in the murder. In return for his testimony, Coslow was allowed to plead to the reduced charge of accessory after the fact and received a 5 year prison sentence.

At the trial Lee was represented by Colwart, the attorney who had represented Coslow at the preliminary hearing. Lee was found guilty of second degree murder and was sentenced to the mandatory sentence of life imprisonment at hard labor.

(1) Lee's First Direct Appeal

Colwart filed a timely motion for appeal, which was granted by the trial court, and the record was lodged with the appellate court. On appeal Colwart did not assign errors or file a brief. The Louisiana First Circuit Court of Appeals reviewed the record for "patent error" and affirmed Lee's conviction on August 19, 1996. Colwart did not seek writs with the Louisiana Supreme Court within the 30 day period provided by the Rules of the Louisiana Supreme Court.

(2) Lee's State Post-Conviction Applications and Out-of-Time Appeal

Lee filed his first *pro se* application for post-conviction relief. This application did not contain any of the grounds concerning ineffective assistance of counsel involving a conflict which he now alleges in this writ. On September 9, 1997 the trial court denied this first application. Lee filed a second pro se application for post-conviction relief. This second application did not contain any of the grounds concerning ineffective assistance of counsel involving a conflict which he now alleges in this writ.

James Boren, Lee's present attorney, filed a motion to enroll and a motion to convert Lee's application for post-conviction relief to an out-of-time appeal in accordance with the Louisiana Supreme Court case of *State v. Counterman*. This third pleading did not contain any of the grounds concerning ineffective assistance of counsel involving a conflict which he now alleges in this writ. On September 24, 1999 the trial court granted Lee's motion for an out-of-time appeal. In his brief to the appellate court Lee, for the first time, assigned as error and briefed the conflict of interest issue involving Coslow. On February 16, 2001, the First Circuit "conditionally affirmed" Lee's conviction and ordered an evidentiary hearing on the conflict issue. The trial court held the hearing and on June 24, 2003 and granted Lee a new trial finding that Colwart's representation was ineffective due to his inability to adequately cross examine his former client, Coslow, on the issue of Coslow's

intoxication at the time of the murder. The state applied for writs to the First Circuit, which reversed the trial court and affirmed Lee's conviction. Lee applied for writs to the Louisiana Supreme Court which on November 24, 2004 denied writs. Lee did not file a writ with the United States Supreme Court to review the denial of writs by the Louisiana Supreme Court.

Almost a year later, on November 22, 2005, Lee filed his third application for post-conviction relief in state district court. This third application was denied by trial court. Lee filed for writs of review with the First Circuit which denied writs. Lee filed for writs with the Louisiana Supreme Court, which denied writs.

(3) POST-CONVICTION RELIEF IN FEDERAL COURT

In the meanwhile, Lee had filed for habeas review in the Western Federal District Court, State of Louisiana on February 23, 2007 and requested that it be stayed pending the outcome of his writ in the Louisiana Supreme Court. Once the Louisiana Supreme Court denied writs, Lee's motion to proceed forward with his federal habeas was granted on May 18, 2007. The federal district court denied Lee federal habeas relief on June 28, 2007 on the grounds that the one-year statute of limitation period found in 28 U.S.C. Section 2244(d)(1)(A) did not "re-start" and run anew with the granting of the out-of-time appeal

citing *Salinas*. Both the federal district court and the Fifth Circuit denied a certificate of appealability. It is this writ which is before this court.

B. LOUISIANA'S OUT-OF-TIME APPEAL LAW AND THE APPLICATION OF *SALINAS*

(1) CONSTITUTIONAL RIGHT TO APPEAL

We begin with the principle that there is no federal constitutional right to appeal or review in a state court. *McKane v. Durston*, 153 U.S. 684, 687-688 (1894). Consequently, a federal court should defer to a state court's interpretation of a state statute on the issue of whether the type of state review is direct review or collateral review. As the facts of this case illustrate, this distinction can be critical in federal habeas. A review of the cases of the various federal circuit courts of appeal shows that the "conflict" among the circuits is, to some extent, the product of their interpretation of different state statutes and jurisprudence concerning what constitutes direct review versus collateral review. Because the federal courts are interpreting the meaning of the federal statutory term "direct review" in a state jurisprudential context and using state statutory law and jurisprudence, the perceived conflict is not significant. Moreover, to the extent that any conflict exists in the type of analysis used by the federal circuit courts, that conflict should be resolved in favor of the clear congressional intent behind the AEDPA to limit the

time span for applying for federal habeas so that appeals and writs do not drag on for years. In other words, the general intent of Congress in enacting the AEDPA to eliminate the long delays in appeals and writs should be the main consideration followed in the interpretation of any state statute or jurisprudence which defines "direct review" in a state law context.

(2) *STATE V. COUNTERMAN* AND LOUISIANA'S OUT-OF-TIME APPEAL LAW

There is no statutory or constitutional law in Louisiana concerning a defendant's right to an out-of-time appeal. The Louisiana Constitution of 1974 provides that "[n]o person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review." The Louisiana Code of Criminal Procedure provides for direct appeal in Articles 911 to 923 and for collateral review or post-conviction relief in Articles 924 to 930.8. There is no provision for an out-of-time appeal in Louisiana statutory law. The concept of out-of-time appeal in Louisiana is a product of Louisiana Supreme Court jurisprudence found in *Counterman*.

Lee asserts that there are only two methods of analysis used by the states in deciding when "direct review" ends. The decision of the Louisiana Supreme Court in *Counterman* shows another method of analysis namely, that of mode of invocation. In Louisiana

one may obtain direct review "of right" so long as the defendant files a proper motion or notice of intent to appeal. Once the date for filing for appeal has elapsed, the only other way to direct review is to file an application for post-conviction relief. The granting of any application for post-conviction relief and the ordering of direct review is discretionary with the state trial court and is normally only ordered when the defendant has not had an direct review of his conviction. The discretionary nature of the granting of post-conviction relief is a critical distinction in terms of the congressional intent to limit the length of time of writs and appeals. A defendant can sit on his application for post-conviction relief for two years after his conviction becomes final on direct review, the time requirement of Louisiana statutory law, and then file an application for post-conviction relief asking for an out-of-time appeal. If the state district court grants an out-of-time appeal of right, then the one-year federal period is extended by at least another year (the time of sentencing which is the date when the defendant's conviction became final, assuming he did not appeal, or when the court of appeals affirms his conviction or when the Louisiana Supreme Court denies his writ application) or more than one year as the case makes its way through the Louisiana appellate system. This procedure would seriously compromise the congressional intent behind the enactment of the AEDPA of limiting the time in which federal habeas can be filed so as to eliminate the long delays in federal habeas proceedings.

The Louisiana Supreme Court jurisprudentially created the procedure for obtaining an out-of-time direct appeal in the case of *State v. Counterman,* 475 So.2d 336 (La. 1985). In *Counterman,* the court stated that "[t]he central issue, therefore, is whether a defendant who seeks an appeal after the time for appealing has elapsed is relegated to post-conviction relief or whether he may file a motion for an out-of-time appeal in either the district court or the court of appeal." *Counterman*, at p. 339. The court found that "the appropriate procedural device for a defendant to seek the exercise of his right to appeal, after the delay provided in Article 914 has expired, is an application for post-conviction relief pursuant to Articles 924-930." *Counterman,* at p. 339.

As a result, the granting of a motion for out-of-time appeal is discretionary with the trial court, while a properly filed motion for appeal is of right. On the other hand, once an out-of-time appeal is granted, all of the normal state procedural rules governing appeals of right apply including, counsel if indigent, a record of the proceedings, and the right to request review of the appellate court decision by the Supreme Court.

(3) FIFTH CIRCUIT AND *SALINAS*

The Fifth Circuit Court of Appeals has considered the issue involved in this case in the context of a Texas statute and held that the granting of the appeal did not restart the one-year clock. In *Salinas* the

court found that Texas law provided for an initial right of appeal and also for a discretionary appellate review. Salinas was granted discretionary appellate review and argued that the one-year clock should start anew. The Fifth Circuit rejected this view and found that the AEDPA provides "for only a linear limitations period" which starts on a specific date and ends on a specific date so that while this time limitations period may be tolled, it may not begin to run anew. In *Salinas* the critical question concerns the "manner" or "mechanism" in which review is obtained and not the function of the review (direct review of all issues or limited review) or the terms used to define the review (direct or collateral). According to *Salinas*, once the "normal direct review" takes place, the federal AEDPA clock starts to run. While it can be tolled or stopped, it cannot be restarted.

(4) APPLICATION OF *SALINAS* IN LOUISIANA

The logic of *Salinas* has been followed in a Louisiana context in the recent Fifth Circuit case of *Butler v. Cain,* 2008 WL 2514644, 6/25/08 where the court stated "[a]lthough federal, not state, law determines when a judgment is final for federal habeas purposes, a necessary part of the finality inquiry is determining whether the petitioner is still able to seek further direct review. As a result, this court looks to state law in determining how long a prisoner has to file a direct appeal." *Butler,* p. 4. Additionally, a number of Louisiana federal district courts have

applied *Salinas* to Louisiana law. See *McGee v. Cain*, 104 Fed. Appx. 989 (5th Cir. 2004), *Soileau v. Cain*, 2005 WL 1629945, *Sparks v. Hubert*, 2008 WL 1746724, *Robinson v. Cain*, 2008 WL 821955, *Jennings v. Leger*, 2008 WL 2899571, *Tapp v. Cain*, 2007 WL 2323356, and *Gilliam v. Jones*, 2007 WL 1347807.

C. Comparative Analysis of Out-of-Time Appeal Jurisprudence in Federal Appellate Courts.

A survey of the federal jurisprudence on this issue presents two groups of cases. The first group, *Frasch*, (4th), *Summers*, (9th), and *Orange*,(10th), support Lee's position that the one-year clock restarts and begins to run anew. The second group, *Lopez*, (6th), *Teas*, (7th), and *O'Neal*, (8th), and follow the logic of *Salinas* that the one-year clock does not restart and begin to run anew.

1. *Frasch*, (4th), *Summers*, (9th), and *Orange*, (10th).

The Fourth Circuit in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005) found that the granting of a new direct appeal upon the filing of an application for post-conviction relief 10 years after the right to a direct appeal had run "restarted" the one-year clock and specifically rejected the *Salinas* analysis. In *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007), the Eighth Circuit held that a "functional analysis"

should be applied to determine what is "direct review" under the AEDPA as matter of federal law. As a result, the granting of an Arizona State Rule 32 appeal pursuant to the Arizona Rules of Criminal Procedure restarted the one-year clock because it was a "form of direct review" under Arizona law. *Summers*, p. 716. The Tenth Circuit in *Orange v. Calbone*, 318 F.3d 1167 (10th Cir. 2003) found that under an Oklahoma state statute which granted the defendant the right to file an out-of-appeal on post-conviction relief Orange's application restarted the one-year federal clock 18 months after the time for filing a direct appeal had lapsed.

2. *Lopez*, (6th), *Teas*, (7th), and *O'Neal*, (8th).

In *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005) the court interpreted an Ohio Rule of Appellate Procedure, Rule 26(B), which allows the re-opening of direct appeal on the basis of ineffective assistance of counsel. The court found such a re-opening of direct review to be in the nature of a "collateral post-conviction procedure." *Lopez*, p. 341. As a result, Lopez had no right to counsel for direct appeal secured through collateral post-conviction procedure. In *Teas v. Endicott,* 494 F.3d 580 (7th Cir. 2007), *Teas* filed collateral review arguing that his counsel was ineffective because he missed a deadline for appeal. The Wisconsin Supreme Court granted *Teas* "belated review" but denied review as if on direct appeal. *Teas*, p. 583. When *Teas* filed a federal habeas petition, it

was denied on the grounds that the one-year clock had run. On appeal the Seventh Circuit held that once the one-year clock runs that is it. It cannot restart. That is the "conclusion of direct review" in state court. The court cited *Evans v. Chavis*, 546 U.S. 189 (2006) and *Cary v. Saffold*, 536 U.S. 214 (2002) in support, noting that those cases recognized the need for uniformity on the question of when direct review ends, and that whatever terms are used by a state court or in a state statute to define whether it is direct or collateral does not control the decision a federal court must make on this issue. In the case of *O'Neal v. Kenny*, 2007 WL 2492466 the Eighth Circuit considered a Nebraska case in which O'Neal was granted a "new direct appeal" as a result of his application for post-conviction relief. The Eighth Circuit held this new direct appeal was not part of AEDPA direct review since it was a "new direct appeal" and not a reinstatement of a past direct appeal. As a result, the one-year clock had run on O'Neil's federal habeas petition.

D. *Salinas* Is the Correct Resolution of Any Conflict.

This analysis brings the court to the point of deciding what is the standard to be used to decide when the "conclusion of direct review" takes place, as that term is used in the AEDPA. The reliance on the terms used by a state court or statute will result in allowing the states the control when direct review is final. The use of the functional approach will also

allow the states to fix the conclusion of direct review simply by giving a defendant a new appeal. Both of these standards will greatly increase the time in which federal habeas can be timely filed. One only needs to look as far as *Frasch*, where the defendant was allowed to file federal habeas ten years after his right to direct appeal and ended, to see the abuse that can take place. If *Frasch* is held to be the correct interpretation of the AEDPA, then any state court judge in Louisiana can restart the one-year AEDPA, clock simply by granting an out-of-time appeal. Such an approach would clearly not support the goals of Congress in enacting the AEDPA of finality and respect for considered state court judgments.

This court has held that the goals of the AEDPA provisions include ensuring "that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain collateral attack upon that judgment," and the "finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2110, 150 L.Ed.2d 251 (2001).

Neither functional of definitional analysis provide an adequate standard for the court to use to determine what is "direct review" for the purpose of federal uniformity. The respondent submits that the standard found in *Salinas* best promotes the intent of Congress in enacting the AEDPA, that of finality. Salinas concentrates on the "manner" or "mechanism" in which the review is obtained and not on the function of the review (direct review of all issues or limited review) or on the terms used to define it (direct

or collateral). As a result, once the "normal direct review" takes place, the federal AEDPA clock starts to run. While it can be tolled, it cannot be restarted.

An analysis of these cases reveals that many of them arise in cases of guilty pleas where involving counsel who failed to timely appeal a conviction. Experience shows that in Louisiana a district court when faced with the thorny issues of ineffective assistance of counsel on post-conviction relief will simply grant an out-of-time appeal hoping that the court of appeals will resolve the issue without an extensively time consuming evidentiary hearing.

E. Should Writs be Granted in Light of the Writ Grant in *Jimenez v. Quarterman*?

The question of whether there is a sufficient conflict among the circuits to justify the granting of writs in this case may be moot in light of the recent granting of writs in the similar case of *Jimenez v. Quarterman,* No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352. As a result, this court may decide to simply wait upon the decision in that case and then either dismiss the petition or remand Lee's petition to the district court for reconsideration in light of the decision in *Jimenez*. On the other hand, this court may want to grant writs in *Lee* and consider the application of *Salinas* in the context of Louisiana's out-of-time appeal procedure.

CONCLUSION

The respondent initially argues that writs should not be granted in this case for three reasons. First *Salinas* is the correct interpretation of the AEDPA. Second, any conflict among the circuits is not substantial. Finally, this court has granted writs in *Jimenez* on the same question that this case presents. On the other hand, this court may decide to grant writs so that the application of *Salinas* under both Texas and Louisiana law can be fully briefed and decided.

PRAYER

WHEREFORE, the respondent prays that this court deny this Application for Writs.

Respectfully submitted,

16th Judicial District
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